

Wednesday, 6 November, 1946

INTERNATIONAL MILITARY TRIBUNAL
FOR THE FAR EAST
Chambers of the Tribunal
War Ministry Building
Tokyo, Japan

PROCEEDINGS IN CHAMBERS

On

Paper No. 508 - Application of
the Defense in re: Opening State-
ments for each phase of the case
for the Defense and summation for
individual defendants, and in re:
Defense Witnesses.

Before:

HON. SIR WILLIAM WEBB,
President of the Tribunal and
Member from the Commonwealth
of Australia.

Reported by:

Julian Wolf
Court Reporter
IMTFE

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Appearances:

FOR THE PROSECUTION SECTION:

MR. E. WILLIAMS

MR. SOLIS HORWITZ

FOR THE DEFENSE SECTION:

MR. WILLIAM LOGAN, JR., Counsel for
Accused KIDO, Koichi

MAJOR BEN BRUCE BLAKENEY, Counsel for
the Accused, TOGO, Shigenori and
UMEZU, Yoshihiro

MR. MICHAEL LEVIN, Counsel for the
Accused KAYA, Okinori and SUZUKI,
Teiichi

MR. GEORGE YAMAOKA, Counsel for the
Accused TOGO, Shigenori

MR. OWEN CUNNINGHAM, Counsel for the
Accused OSHIMA, Hiroshi

DR. UZAWA, Chief Japanese Counsel

FOR THE OFFICE OF THE GENERAL SECRETARY, IMTIE:

EDWARD H. DELL, Judge,
Legal Adviser to the Secretariat

MR. CHARLES A. MANTZ, Clerk of the Court

MR. H. W. DELANEY, Deputy Clerk of the
Court

The Proceedings were begun at 0900.

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THE PRESIDENT: This is a motion by the Chief Japanese Counsel on behalf of all the accused -- I take it by Mr. Blakeney for the accused TOGO and UMEZU -- for permission to make several opening statements, in addition to a general opening statement for each accused.

Who is supporting the application?

Mr. Blakeney.

MR. BLAKENEY: This motion represents the efforts of the planning committees of the defense to work out an expeditious method of presenting the defense. We do not want to be here another year on our part of the case.

THE PRESIDENT: Will it make for expedition?

MR. BLAKENEY: We think so, sir. What we have in mind in a general way is this: That we can assemble some parts, I would not say the considerable part, but some parts of our evidence into what I call phases, in the same way as the prosecution has done -- into groups. We can group subject matters in such a way that the evidence bearing on those points will relate to a major or a considerable number of defendants. Therefore, the evidence would not have to be presented

with duplication by individuals. I will say, frankly, we do not know yet how many of these phases there will be. There will be quite a few in number and we do not know what part of our evidence, speaking in the sense of a percentage, can be treated in this way.

The establishment of some sort of system in presenting the defense is a prerequisite to the Committees' making any detailed plans on how to present it. As I am sure you apprehend we have a tremendous problem of trying to get twenty-seven defendants, all represented by lawyers, to agree on almost anything; and this, I say, does represent our efforts to do that.

What we hope to do by this motion is to be permitted not only to present our evidence in those phases, but, I assume, we would have the right to do anything any way, but to make concise statements of what each phase is and at the end, in accordance with ground two of the motion, to make summations not only on the behalf of each defendant, but general summations on these points as treated in phases.

Ground three of the motion in connection with witnesses has a similar intent. There are many, many witnesses whose testimony will be needed by anywhere from two to ten to fifteen defendants. We think it would be terribly inefficient and time consuming if

that testimony were all put in at once by the first defendant who happened gratuitously to call him, and, then, if subsequent defendants were compelled to refer back probably each of them would feel obliged to refer rather freely by reading the evidence to show how it fits into his case.

We suggest then, by this ground of the motion, that such a witness' testimony might be broken down. He might testify for defendant "A" on matters concerning defendant "A", then be excused and be recalled later by defendant "J" and give the testimony there which concerns that defendant. Our feeling is that that is the obviously efficient way to do it and I cannot see that it would be objectionable in any way.

In fact, this motion was discussed with Mr. Keenan before it was filed and he stated that he had no objection. I do not know whether that is your position, Mr. Williams.

MR. E. WILLIAMS: It is not a matter of objecting at all. It is a matter for the absolute discretion of the Court.

There is only one thought that occurred to me in connection with it; that is your suggestion about the making of separate summations. It occurs to me that the prosecution will probably make a summation

of the entire case and there is not any reason why summations should not be made in that connection instead of summations of separate phases, as you suggested. I assume that each defendant has a right to make a summation on his own behalf, but why there should be a number of summations on different phases is something I cannot understand.

THE PRESIDENT: I think it is a bit early to decide the summation point.

MR. BLAKENEY: Of course, the Indictment may be dismissed before we start.

To explain exactly what we had in mind there I will give you an example: No individual defendant wishes to take his entire time allowed for summation in order to argue the question of conspiracy. That is a matter of general interest which certainly ought to be argued and yet the place --

MR. E. WILLIAMS: That was not the point I was making. You were talking about the right to make separate summations as to different phases.

MR. BLAKENEY: That is a phase in our definition.

MR. E. WILLIAMS: I thought you were referring to phases in the sense that the prosecution had divided the case up into phases. Is that what you meant?

MR. BLAKENEY: Our phases would be different. We would have to divide the case according to our theory of defense, not according to the prosecution theory of prosecution. That is why we said such phases as may be deemed most expeditious and efficient.

MR. E. WILLIAMS: I just wanted to put that thought before the Tribunal, that with all fairness to the defendants there should be some system devised by which there will not be any unnecessary repetition in summation.

MR. BLAKENEY: Quite, that is precisely our desire.

THE PRESIDENT: Major Blakeney, on the opening statements I suggest that what you propose would not be objectionable if we could say that all the opening statements, the general opening statement and the particular opening statements, will not take in the aggregate more than a certain number of days. That would be some safeguard against loss of time.

MR. BLAKENEY: Yes.

THE PRESIDENT: You could really make an estimate of what time the prosecution spent on opening statements. You should be able to spend at least as much time, I would think, as you have twenty-six men to defend. At the same time I think there were

reasons for allowing the prosecution to have a number of opening statements which are not open to you.

MR. BLAKENEY: Yes, sir, that is why we have taken the matter up on motion instead of assuming that it would be permitted.

THE PRESIDENT: Yes, they have had to cover all the ground; yet no single defendant has to do so. I can see what you propose may lead to saving of time. At first glance you might get the other impression.

MR. BLAKENEY: That is certainly the intention of it, sir, as well as our belief that it will be accomplished.

THE PRESIDENT: Time could be safeguarded by reaching an understanding that the total time spent on openings will not exceed prosecution.

MR. BLAKENEY: Fixed as we are as to the mechanics, that is to say, our planning committee is charged with the work of laying out the case, we cannot proceed to do so until we know whether it will be permitted to take up the question, say of conspiracy, open the subject, put on the evidence and later sum up. That is our dilemma. We must know whether that can be done or whether each individual defendant must individually defend against the charges of conspiracy, which will in effect mean the same defendant twenty-

six or twenty-seven times over.

We are not concerned with the question of time on openings at this juncture and we will be quite amenable to any reasonable provision in that regard.

THE PRESIDENT: On the other hand, the Court may further rule that each defendant may state everything that he can bring to bear on his defense. We have to deal with it more acceptably. We have to consider the evidence against each and for that reason I have no doubt we would prefer to see each defendant say all that can be said in his own favor without having to refer to what any other defendants said.

MR. BLAKENEY: Of course that would be done in this sense: That in addition to evidence of general application of all defendants each defendant will then follow with evidence peculiar to him and we presume that in summation he would be expected to tie all those things together to make a complete whole.

THE PRESIDENT: Of course, there are a number of general statements which can be said, once, for all time, covering all the defendants -- the law particularly. I suppose there would be no difference among the defendants as to what the law is or may be.

MR. BLAKENEY: I hope so.

THE PRESIDENT: All that could be covered in one opening statement.

Well, with that safeguard I cannot see great objection to what you propose.

MR. LEVIN: Mr. President, I was going to suggest that Mr. Blakeney did not refer to it, but I assume that in relation to the opening statement and the various phases -- the general opening statement -- the Court will permit the defense to use their discretion as to the division of that; in the event they wanted two or three or four members of the defense to make that type of opening statement, the Court would have no objection provided it came within the time limit. That was agreed upon or indicated by the Court. In other words, it is not -- I do not know what the final plan is among our group -- I have not heard it discussed, but it might be that there may be a number. It may be desirable to divide the opening statement among the two or three or four that I have indicated and I assume there would be no limitation so far as the Court is concerned so long as we came within any order of the Court as to time. I have not discussed that with any of my colleagues in any way. The thought occurred to me during this discussion.

MR. BLAKENEY: I think I had better say for

the record that the committees charged with planning these matters at this time have no such intentions as Mr. Levin says. It has not been decided. We have no scheme for trying to let every lawyer address the Court in the same opening statement. That is not our intention at all and I do not want it thought that it is. Of course, we have a great many different lawyers to contend with and we may have our own difficulties in that way, but if the Tribunal grants leave to do certain things and later feels moved to fix the time which may be occupied in doing them, we will worry out our own problem about who does.

THE PRESIDENT: On the matter of time you might make some valuable suggestion Major Blakeney. I think those time limitations were fixed in Germany. They may seem arbitrary, but they are done in every Court at times.

MR. BLAKENEY: We have not given any consideration to that question, sir, because we assume that opening statements would be treated as they were for the prosecution and within the limits of conciseness we would not be limited, but that summations would probably be fixed as to a definite period of time.

THE PRESIDENT: We had better leave summations until a later date. We may have to leave them long

before the summations are held.

MR. BLAKENEY: You may. If it is the Tribunal's desire our committees can work on the problem of time and try to submit suggestions but --

THE PRESIDENT: These opening statements and summations are a valuable part of the proceedings when you have got to distinguish between the case of each of the defendants, deal with them separately as we must.

MR. E. WILLIAMS: I think I could make a suggestion that would be very helpful to the defense. If they would permit Mr. Cunningham to make all of their opening statements, his views as to the necessity of terseness and conciseness are so definite he would not take very much time.

MR. CUNNINGHAM: Your Honor. You are not far wrong Mr. Williams, I will tell you that.

THE PRESIDENT: I do not intend to give a decision today on a matter of this importance. I am quite sure each of my colleagues has certain views about this thing and I would like to consult them all. However, I do not think we will take long about it. It does appear to me that this safeguard about limiting the opening to a certain number of days in the aggregate should get over all the difficulties and what you

propose certainly is not going to lead to confusion as far as I can judge, but a greater clarification.

MR. BLAKENEY: We hope so, sir.

MR. YAMAOKA: That is our intention.

THE PRESIDENT: I will reserve consideration for that until I consult my colleagues.

(Whereupon, at 0913 the proceedings were concluded.)

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